Enterprise Aggregates Corporation *and* Local No. 12, International Union of Operating Engineers, AFL-CIO *and* Joseph Velasco. Cases 22-CA-21337 and 21-CA-21628

14 August 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 2 August 1983 Administrative Law Judge Burton Litvack issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel filed a brief answering the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions, and to adopt the recommended Order.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Enterprise Aggregates Corporation, Paramount, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order, except that the attached notice is substituted for that of the administrative law judge.

MEMBER HUNTER, dissenting in part.

Contrary to my colleagues, I find that the Respondent did not deny accrued vacation benefits to striking employees Ortega and Velasco and therefore that the Respondent did not violate Section 8(a)(1) and (3) of the Act in this respect.

It is well established that an employer may not discriminate against striking employees with regard to the payment of accrued benefits. However, in my view, the General Counsel has not established that Ortega and Velasco had accrued any vacation benefits at the time of the strike.

Thus, the record contains no adequate description of the Respondent's vacation policy. In this regard, the judge specifically discredited the testimony presented by the Respondent that employees were entitled to 2 weeks' vacation after 3 years of service. In finding that Ortega and Velasco had accrued vacation benefits, the judge relied on the employees' description of the Respondent's vacation policy. The judge found their testimony "inconsistent and confusing particularly as to the matter of accrual and as to exactly when employees became eligible to take their earned vacations." Despite these findings, the judge "credited" their versions of the Respondent's policy because he concluded that their testimony was honest. Contrary to the judge and to my colleagues who adopt his findings, I fail to see how the fact that the employee's testimony was honest cures the inconsistent and confusing nature of the testimony itself.[1] It is clear to me that the testimony of Ortega and Velasco falls far short of establishing what the Respondent's vacation policy was and that the employees had accrued benefits under that policy. Thus, in my view, the General Counsel has failed to establish that Ortega and Velasco were entitled to vacation benefits at the time such benefits were requested and denied, and therefore that he has failed to establish matters essential to his case.

In these circumstances, dismissal of the alleged 8(a)(1) and (3) allegations involving vacation benefits is compelled. Accordingly, I dissent from my colleagues' finding of these violations.

[1] The Board's established policy is not to overrule an administrative law judge's credibility resolutions based on demeanor unless the clear preponderance of all of the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544, 545 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the credibility findings in the judge's decision.

[2] We cannot agree with our dissenting colleague's assessment of the issues in this case.

The essential issue is whether under the Respondent's vacation policy the second year or the third year of employment constituted the basis for a second vacation week.

We agree that aspects of the testimony of employees Ortega and Velasco were "inconsistent and confusing." However, both the judge's decision and the record bear out that the inconsistencies go merely to whether vacation benefits accrued *during* or *after completion of* certain years of employment. This was a comparatively minor matter and irrelevant to the ultimate issue of discrimination. On the key issue Velasco's and Ortega's testimony was both clear and consistent: the basis for a second vacation week was 2 years' employment and not 3 years as the Respondent contended. The "2 weeks after 2 years" version of the policy was further corroborated by a third employee, Belvill, who was not claiming that the Respondent unlawfully withheld his vacation benefits. The Respondent's president, Donald Nourse, testified that there was no written vacation policy and no documents available which would substantiate the nature of the policy as it was administered. Taking this into account it is our determination that the General Counsel more than adequately established the pertinent elements of the policy through the consistent testimony of three employees who were familiar with the Respondent's administration of it. With the employees' version of the policy credited by the judge the legitimacy of Velasco's and Ortega's requests for fully accrued vacation benefits was sufficiently established especially in the absence of any contravailing evidence which would support the Respondent's position.

[1] Nor do I find persuasive my colleagues' reliance on the "corroborative" testimony of employee Belvill concerning the Respondent's vacation policy. Although Belvill and Ortega testified that the policy provided for 1 week of vacation during the first year and 2 weeks each year thereafter, I note, as found by the judge, that Ortega did not take a vacation during his first year. More importantly, Velasco disagreed with both Belvill and Ortega when he testified that employees must complete 1 year of service before becoming eligible for a 1-week vacation. Also, I note that the judge did not rely on Belvill's testimony in concluding that the nature of the Respondent's vacation policy had been established.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to pay retirement benefits to employees because they engaged in a strike against us.

WE WILL NOT refuse to pay accrued retirement benefits to employees because they engaged in a strike against us.

WE WILL NOT in any like or related manner interfere with, coerce, or restrain you in the exercise of the rights guaranteed you in Section 7 of the Act.

WE WILL pay to Clifford Belvill his retirement benefits to be computed at the established formula, with interest.

WE WILL pay to Ramon Ortega and Joseph Velasco their respective accrued vacation benefits, with interest.

ENTERPRISE AGGREGATES CORPORATION

DECISION

STATEMENT OF THE CASE

BURTON LITVACK, Administrative Law judge. The above-captioned matters were heard by me in Los Angeles, California, on February 3, 1983. On November 10, 1982, the Regional Director for Region 21 of the National Labor Relations Board (the Board), issued a consolidated amended complaint, based on an unfair labor practice charge in Case 21-CA-21337 filed by Local No. 12, International Union of Operating Engineers, AFL-CIO on July 23, 1982 and an unfair labor practice charge in Case 21-CA-21628 filed by Joseph Velasco, an individual on October 12, 1982, alleging that Enterprise Aggregates Corporation, (Respondent), engaged in acts and conduct violative of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). Respondent timely filed an answer, denying the commission of any unfair labor practices. At the trial, all parties were afforded the opportunity to offer into evidence all relevant material, to examine and cross-examine witnesses, to argue their positions orally, and to file posthearing briefs. Accordingly, on the entire record[1] in these matters, including consideration of the oral arguments at the close of the hearing, and my observation of the testimonial demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a California corporation, is engaged in the mining, processing, and sale of concrete aggregates and operates a plant located in Arcadia, California. In the normal course and conduct of the business operations, Respondent purchases and receives goods and products valued in excess of $50,000 directly from suppliers located within the State of California each of which, in turn, purchased the same goods and products directly from suppliers located outside the State of California. Respondent admits that, at all times material herein, it has been an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

II. LABOR ORGANIZATION

Respondent admits that Local No. 12, International Union of Operating Engineers, AFL-CIO (the Union), has been, at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. ISSUES

1. Did Respondent refuse to pay retirement benefits to employee Clifford W. Belvill because he participated in a strike against it, in violation of Section 8(a)(1) and (3) of the Act?

2. Did Respondent refuse to pay accrued vacation benefits to employees Velasco and Ramon Ortega because they participated in a strike against it, in violation of Section 8(a)(1) and (3) of the Act?

IV. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

The record establishes that Respondent operates a plant in Arcadia, California (at which it processes materials utilized in the production of ready-mix concrete and loads the products onto the trucks of ready-mix customers) and an office in Paramount, California, at which all normal office-related functions are performed. Approximately 15 individuals are employed as production workers at the plant and, until January 4, 1980, at which time it was decertified, the Union represented the employees for purposes of collective bargaining. Donald G. Nourse is the president of Respondent; Mike Nourse, his nephew, is the plant superintendent;[2] and Cheryl Nourse,

[1] At the close of the hearing, counsel for the General Counsel was afforded the opportunity to examine the books and record underlying G.C. Exh. 8 which is a compilation, prepared by Respondent, of its vacation records of three employees, including Ramon Ortega. Counsel was further given permission by me to move that the record to be reopened to receive any relevant documents disclosed by the examination. Thereafter, on February 23, 1982, counsel moved that a document, a photocopy of Respondent's insurance records regarding an insurance claim for Ortega in 1979, be received. I grant his motion and the record is reopened for the limited purpose of receiving the document, referred to herein as G.C. Exh. 10.

[2] There can, of course, be no dispute that Donald Nourse is, at least, an agent of Respondent within the meaning of Sec. 2(13) of the Act. As to Mike Nourse, the record reveals that he is responsible for hiring and

Continued

the daughter of Donald, is the corporate bookkeeper, working in the office.[3]

The alleged genesis of the events herein occurred on November 17, 1981, at which time pickets appeared at the entrance to the plant, carrying signs reading "Enterprise Aggregates not paying prevailing wages, Operating Engineers Local 12, sanctioned by the Construction Trades Council and by the Teamsters." Donald Nourse testified that approximately 13 of his production employees honored the picket line and thereafter engaged in a strike against Respondent. Clifford Belvill, one of the striking employees, testified that the precipitating cause of the work stoppage was the withholding by Respondent of a promised pay raise the previous September. Although the exact date is not clear from the record, the strike lasted for at least 5 months, with the cessation of picketing occurring in May or early June 1982. The record reveals that, during the pendency of the strike, Respondent utilized replacement workers for many, if not all, of the strikers.

The controversies herein concern Respondent's alleged failure to honor its commitment to pay retirement benefits to Belvill and its alleged failure to pay accrued vacation benefits to strikers Joseph Velasco and Ramon Ortega during and after the strike. With regard to the former, Donald Nourse testified that he held a meeting with the production workers in March 1980 and that during it he announced his intention to establish some sort of a retirement system for them. Nourse told them that employees would be eligible for the plan after working for 1 year and that he contemplated some sort of IRA account which would pay an employee, upon retirement, a benefit of six percent of his straight-time pay. He further said that, under the plan, employees would accrue benefits; after a back-and-forth discussion with the assembled workers, Nourse consented to make the commencement of the accural retroactive to January 1, 1980. The record discloses that thereafter, although no employee IRA accounts were ever actually established, Respondent carried on its books the promised retirement benefit and paid to employees who left its employ by reason of retirement, quitting, layoff, disability, or death an amount equal to 6 percent of their accumulated straight-time pay. Thus Darryl Clark and David Warner, who both quit in September 1980, Patricia Taylor, who quit in November 1980, Eugene Kennedy, who became disabled in November 1980, and Jerry Bumgarner and Everett Yander, who were laid off in May 1980, all received amounts ranging from $431.81 to $1,271.55 on leaving their jobs.[4]

With knowledge of the aforementioned benefit, approximately 1 month into the strike the 13 strikers sent to Nourse a joint letter dated December 10, 1981, and signed by each reading, "I, the undersigned, request an immediate payment of all the monies deposited in the individual Retirement Account in my name."[5] In response, Nourse mailed the following identically worded letter, dated December 22, to each signatory employee:

> We are in receipt of the letter which you signed, along with other employees, dated December 10, 1981, regarding payment of any monies presently due you from the Retirement Fund. Monies held in this fund are disbursed only when an employee is laid off, fired or quits.
>
> Inasmuch as the Company has not fired nor laid you off, we cannot disburse any monies to you unless you have quit. To date we have not been notified of your having quit.

Just prior to the cessation of the picketing by the Union, about May 11 or 18, 1982, a group of striking employees, including Belvill and Velasco, met at Respondent's office facility with Nourse and Respondent's labor relations consultant, Norman Jones. Among the subjects discussed was the reinstatement of the strikers. Nourse testified that several offered to end the strike and return to work, but that he told them there were no openings at that time as they had been replaced. According to Nourse, he assured the strikers that they were subject to being recalled when openings occurred. With regard to the matter of the retirement benefit, Belvill testified that "Don told us that he could not do anything until we had quit, and the matter had been settled out there" and Nourse testified that he said that payment of the retirement money was, as yet, not under consideration as the company did not know where it stood and as no one had informed him that the strike was over.

A few days after this meeting, Belvill mailed the following letter to Nourse—"I Clifford W. Belvill, this day May 17, 1982, hereby turn in my resignation as . . . an employee of Enterprise Aggregates. I further more [sic] request all monies due me in my retirement fund." Receiving no response from Respondent, Belvill telephoned Nourse approximately 10 days later. According to Belvill, "I asked when I was going to get the monies that was due me through my retirement . . . I remember him saying not till things were settled." Nourse admitted having received the resignation letter and not responding. As to the telephone conversation, he testified, Belvill asked what Nourse was going to do about the money owed to him and Nourse replied "that I didn't know where we stood, and whether the thing was over, and I wasn't ready to make any decision on it."

What Nourse did not tell Belvill was that he assertedly did not view Belvill's resignation letter as a new circumstance. He admitted that even if Belvill had come before him and said he was quitting, "what he did wouldn't change my position. I wasn't prepared to do anything at that moment, and whether he sent the letter in or not didn't change that." Taking the position that he never

---

firing at the plant and is involved in all major plant operational decisions. Based on this, and the record as a whole, I find that he is a supervisor within the meaning of Sec. 2(11) of the Act.

[3] With regard to her legal status, the record discloses that Cheryl speaks Spanish and is the individual to whom employees speak if they have insurance or other financial problems.

[4] Employee Richard Harvey died on November 18, 1980, and Respondent paid $1,077.72 to his estate.

[5] Belvill testified, without contradiction, that he spoke by telephone with Nourse within a day or two of sending the letter, and "I asked Don, when we were going to get our retirement money, and he said not until things had quieted down on the picket line."

promised to pay the retirement benefit at the exact moment an employee quit or retired,[6] Nourse asserted that, due to the identical financial considerations which caused him to cancel the employee pay raise in September 1981, he was just unable to afford paying Belvill his retirement when the latter resigned. Nourse further asserted that the strike was not a factor in his decision not to give the benefit to Belvill and that he would have acted in an identical manner had a nonstriker quit at that time and requested payment of his retirement money. However, Respondent offered neither financial books and records nor any other evidence justifying or corroborative of Nourse's claim that he was motivated by business considerations in failing to pay Belvill his accrued retirement benefit.

With regard to Respondent's alleged failure to pay vacation benefits to employees Joseph Velasco and Ramon Ortega, it is initially necessary to ascertain Respondent's policy regarding employee-paid vacations. Both Clifford Belvill and Ortega testified that the policy was 1 week of paid vacation during the first year of employment and 2 weeks of paid vacation each year thereafter. Denying that he was required to work a full year before receiving a vacation, Belvill insisted that he was given a 1-week paid vacation early in this first year of employment by Respondent.[7] Ortega, who commenced working for Respondent on March 1, 1978, stated that he was informed of the policy by employees Gene Kennedy and Tito Nino and that he, like Belvill, took a 1-week paid vacation during his first year with Respondent. Confronted with his vacation records,[8] which reflect that he took his initial vacation during the week of June 25 through July 1, 1979, and asked about the apparent inconsistency with his testimony, Ortega responded, "I like that time better to have my vacation." He further testified that sometime during 1981, apparently prior to the start of the strike, he spoke to Plant Superintendent Mike Nourse and requested "a few weeks of vacation, but he said I could only have one, because we were busy there. As to the other vacations, I could take them later on." Joseph Velasco, who was hired by Respondent on September 21, 1978, was internally inconsistent and contradicted Belvill and Ortega as to the specifics of Respondent's employee-vacation policy. Thus, he initially testified that on starting to work Richard Harvey, a working foreman,[9] informed him that said policy was "after one year working there, you get one week's vacation, and after two, you get two [weeks] vacation." Later he altered this, explaining that during his first year an employee could take a week of vacation "and during the second year, you get two weeks." Thereupon, confronted with his vacation records which show him taking his first 1-week paid vacation subsequent to his employment anniversary date in 1979,[10] Velasco stated that he took his vacation then "because you have to work there a whole year to complete. . . . For me to get [a] vacation, I would have to work until September '79. That's one year." He further explained, "You have to work there a full year—that is 365 days—and after you have worked those 365 days, you can take a week after that." Asked when one became eligible for a 2-week paid vacation, Velasco replied, "After you complete your second year."

Ortega and Velasco engaged in the employees' strike against Respondent which commenced on November 17, 1981. Counsel for the General Counsel and Ortega claim that, as of the start of the strike, Respondent owed the latter 2 weeks' vacation pay.[11] Therefore, Ortega testified, sometime in January 1982 he telephoned Cheryl Nourse "to ask for my vacation."[12] Speaking in Spanish, he told Cheryl that he wanted to speak about his vacation pay, and Cheryl replied, "We cannot do anything until the strike is over. That's all." According to Ortega, he telephoned Cheryl again, after the conclusion of the strike in May, and said that, as the strike had ended, he wanted to talk about his vacation money. Stating that she knew nothing about the matter, Cheryl abruptly hung up the phone. Believing that he was still entitled to 2 weeks of paid vacation,[13] Velasco testified, he spoke to Cheryl Nourse in October 1981 (before the strike) and informed her he wanted to take a week of vacation during Christmas that year; Cheryl said okay. Thereafter in December he again telephoned her and, based on their previous conversation, requested a week of vacation pay. About January 9, 1982, Velasco received from Respondent a check in the amount of $360. He further testified that later that month he again telephoned Cheryl, "and I told her that I wanted my 1-week vacation that was still owed me. She told me that Don was upset that she paid me that first week's vacation and that I would not get paid that second week's vacation until the strike was settled." No more was said, and, according to Velasco, he waited until September 1982 to again request the second week of vacation pay which Respondent allegedly owed to him.[14] He spoke to Don Nourse, "and I told him that

[6] Nourse averred that no time frame had ever been established.

[7] Belvill was hired by Respondent on April 25, 1976. Respondent's compilation of employee vacation records (G.C. Exh. 8) goes back only to calendar year 1979 and shows that Belvill received 2 weeks' vacation that year—(July 9 through 22) and 2 weeks each year thereafter.

[8] Ortega's vacation records show that he received 1 week of paid vacation in 1979 (June 25 through July 1), 1 week in 1980 (July 20 through 26) and 1 week of vacation in 1981 (March 27 through April 4).

[9] According to Donald Nourse, Harvey, who had nothing to do with establishing or administering Respondent's vacation policy, was the night foreman. In this position, while having no authority to hire or fire, Harvey was in charge of four other employees, was the only managerial representative at the plant, directed the work, and assigned overtime if necessary. However, Nourse testified, if any major problems arose, Harvey was required to consult with Mike Nourse.

[10] Velasco's vacation records show that he received a 1-week paid vacation in 1979 (October 1 through 7), 1 week in 1980 (August 31 through September 6), and 1 vacation week in 1981 (May 3 through 9).

[11] Utilizing either Velasco's or Ortega's version of the vacation policy, the claimed owed 2 weeks' vacation pay would be for the period February 27, 1980, through February 26, 1981. In the view of counsel for the General Counsel and Ortega, the latter's paid vacation taken March 27 through April 4, 1981, was, in reality, the second week owed to Ortega for the time period February 27, 1979, through February 26, 1980.

[12] Ortega stated that he previously had spoken to Cheryl regarding insurance and other matters.

[13] Based on either his or Ortega's formula for computing vacation pay, the claimed owed vacation pay was for the period September 21, 1980, through September 20, 1981. Thus, in his view, and that of counsel for the General Counsel, the 1 week of paid vacation in 1981 (May 3 through 9) was, in reality, the second week owed Velasco for the time period September 21, 1979, through September 20, 1980.

[14] Counsel for the General Counsel likewise joins in this claim.

I wanted my second week's vacation. And he told me that I wasn't due another vacation."

Contradicting the testimony of Belvill, Ortega, and Velasco, Donald Nourse asserted that Respondent's employee vacation policy has always been 1 week after 1 year and 2 weeks after 3 years (the employees' third employment anniversary date).[15] With regard to Ortega, Nourse, testified, he would not ordinarily have been eligible to receive 2 weeks' paid vacation until February 27, 1981; however, inasmuch as Ortega quit work for a period of 6 weeks (July 15 through August 25) in 1979 and was returned to work as a new employee with a new hire date, he was not eligible for 2 weeks of paid vacation at the commencement of the strike. As to Ortega's 6-week absence in 1979, Nourse stated that he just stopped working and "It's my understanding that he went to Mexico. I was told that that is what he did." While assertedly taking Ortega back as a new employee, Nourse required him to fill out no new employment forms. Contradicting Nourse, Ortega testified that while he did, indeed, miss work for a 6-week period in 1979, he wa disabled as a result of a "knee problem" with the full knowledge of Respondent and that he was not required to return to work as a new hire. While Nourse denied the existence of any insurance records which would substantiate the testimony of Ortega, in Respondent's files, General Counsel's Exhibit 10, are insurance forms showing the payment by Respondent's insurance carrier, Occidental Life Insurance Company of America, in November 1979 of $196.40 to a Dr. Lizarraga for medical treatment given to Ramon Ortega in July 1979, 4 days before the latter began his 6-week absence. As to Joe Velasco, Nourse initially testified that the January 9, 1982 payment to him was inadvertent as "the fact that he had been paid early for his vacation was missed." Noting that "while on the picketline he was given a check," Velasco, Nourse further testified, was not entitled to that payment and he (Nourse) would have stopped his daughter from paying had he been aware of her actions. Later, Nourse again testified about the incident—"When I found out that that had been paid, I said 'What the hell did we do that for?' And [Cheryl] said, 'Well, he had a week coming—he didn't get his vacation. . . .'" Nourse responded that Velasco had been paid already and, in his words, was upset about the payment. When confronted by the undersigned that, crediting his version of respondent's vacation policy, Velasco had, in fact, celebrated his third employment anniversary on September 21, had accrued 2 weeks' paid vacation the preceding 12 months, and was, at least, entitled to 1 week of paid vacation at the time of his request to Cheryl, Nourse admitted his error and explained his reaction to the January 1982 check as" I didn't think he was" entitled to the money.[15]

Neither Cheryl Nourse nor Mike Nourse was called as a witness by Respondent to corroborate Respondent's version of the facts.

[15] Nourse did, however, corroborate Velsaco that an employee accures the vacation time during the previous year—so that, for example, an employee accrues 1 week of paid vacation during his first year of employment and is eligible to receive it after the first anniversay date. In practice, Nourse admitted, employees are permitted to take the accrued vacation earlier than the anniversary date.

B. *Analysis*

The consolidated amended complaint alleges that by withholding retirement moneys from Clifford Belvill[16] and by failing and refusing to pay accrued vacation benefits to Joseph Velasco and Ramon Ortega, Respondent engaged in conduct violative of Section 8(a)(3) and (1) of the Act. There is, of course, no dispute that the aforementioned employees participated in the general concerted work stoppage and strike against Respondent; however, the latter asserts that the refusal to pay Belvill was motivated solely by financial considerations and that, as to Ortega and Velasco, the former was not eligible for additional vacation payments and the latter had received all payments due to him in accord with its vacation policy. Contrary to Respondent, there exists ample evidence in the record that the employee's strike was a motivating factor[17] in Respondent's decisions to act as it did. Thus, Nourse did not controvert the testimony of Belvill (who I found, was an honest and forthright witness and shall be credited herein) that, during a December 1981 telephone conversation, he told Belvill that no retirement monies would be paid until things quieted down on the picketline. Further, during the employee meeting, in May 1982, with Nourse and his labor-relations consultant, Nourse reaffirmed his earlier comment to the assembled strikers, saying nothing would be done until the matter had been settled "out there." Finally, after Belvill formally resigned, Nourse admittedly told him, with regard to paying the promised retirement benefit, "that I didn't know where we stood, and whether the thing was over, and I wasn't ready to make any decision on it." Besides her father's somewhat cryptic but nonetheless obvious references to the strike, Cheryl Nourse, acting as Respondent's agent,[18] also mentioned the ongoing strike as a factor in refusing employee requests for their respective accrued vacation benefits. Thus, it was uncontroverted that she denied Ortega's request for vacation pay, saying "We cannot do anything

[16] It is noted that Belvill resigned from Respondent's employ prior to formally requesting his accrued retirement moneys. However, such does not detract from his status as a statutory employee within the meaning of Sec. 2(3) of the Act as that section of the Act has been construed broadly to include former employees of a particular employer. *Little Rock Crate & Basket Co.*, 227 NLRB 1406 (1977).

[17] The existence of unlawful motivation is sufficient to establish a prima facie violation of Sec. 8(a)(1) and (3) of the Act, and the Board will not "quantitatively analyze" the effect of the unlawful motive. *Wright Line*, 251 NLRB 1083, 1089 fn. 14, enfd. 662 F.2d 899 (1st Cir. 1981).

[18] The critical question with regard to Cheryl's status as an agent, for whose conduct Respondent was responsible, is whether employees would have reasonable cause to believe she spoke on behalf of Respondent. *R.J. Liberto, Inc.*, 235 NLRB 1450, 1452 (1978). I believe such existed herein. Thus, not only did she have the title of bookkeeper, giving her a status significantly higher than rank-and-file production employees but also she was the daughter of the company president, was able to effectively communicate with employees because she spoke Spanish, and was the person to whom employees addressed questions concerning insurance and other matters. In short, given these factors and the relatively small employee complement, when she expressed an opinion or attitude I believe employees could justifiably conclude that she was expressing the opinion of views of Respondent. *Town & Country Supermarkets*, 244 NLRB 303, 306 (1979); *R.J. Liberto*, supra. Therefore, she acted as an agent of Respondent within the meaning of Sec. 2(13) of the Act at all times material herein.

until the strike is over. That's all," and that she handled Velasco's demand for a second week of vacation pay in a like manner, stating that her father was upset over her payment of a 1-week paid vacation and Velasco "would not get paid that second week's vacation until the strike was settled." In these circumstances, given Donald Nourse's admission that he had, indeed, committed Respondent to paying a retirement benefit to employees who resigned from its employ and, for the momemnt, crediting Ortega and Velasco that each had accrued and was entitled to receive vacation benefits prior to the start of the strike and that each was denied same during the strike, I believe that the General Counsel has established a prima facie case that Respondent was unlawfully motivated by the employees' participation in the ongoing strike in refusing the respective requests of Belvill, Ortega, and Velsaco for the said monies.

The burden of persuasion thereafter shifted to Respondent to prove that it would have engaged in the aforementioned conduct notwithstanding the existence of unlawful motivation. *Wright Line*, supra; *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). With regard to its failure and refusal to pay a retirement benefit to Belvill, Respondent conceded its general liability to pay but asserted that Nourse's refusal to pay in May 1982 was based on financial considerations and that, even if a nonstriker quit and demanded payment of a retirement payment at that time, Nourse would have similarly refused. Other than this bare assertion, however, there exists not a scintilla of corroborative evidence that Respondent was financially unable to pay Belvill. Moreover, as will be fully explored below, I was not at all impressed with Donald Nourse's demeanor and do not credit his unsupported testimony. Accordingly, I do not believe that Respondent has established that it would have withheld payment of Belvill's retirement benefit, notwithstanding his participation in the employees' strike. As to the uncontroverted failure and refusal to pay the requested vacation benefits to Ortega and Velasco whether, as asserted by Respondent, the former was ineligible for additional vacation payments and the latter had received all that was due to him is contingent on the exigencies of Respondent's paid vacation policy, a conclusion which depends on a resolution of the credibility of the witneses. In this regard, I profess that I was less than impressed with the testimony of employee witnesses Ortega and Velasco. Although the gist of their testimony was that the policy was 1 week of paid vacation after 1 year of employment and 2 weeks after 2 years, I found their accounts inconsistent and confusing particularly as to the matter of accrual and as to exactly when employees became eligible to take their earned vacations. Despite the foregoing, I nonetheless believe that their confusion was honest and not caused by deliberate intent to fabricate and that each was a forthright and candid witness. In contrast, Donald Nourse, who asserted that an employee did not become eligible for 2 paid weeks of vacation until he completed his third year of employment, appeared to be a particularly disingenuous witness. This conclusion is based not only on his demeanor while testifying but also on what I perceive as constituting a deliberate falsehood—the matter of Ortega's 6-week absence from work in 1979. While the employee testified that he had become disabled with a "knee problem," Nourse insisted that Ortega had, in reality, abruptly quit and departed for Mexico and that Respondent's records contained no documents which would substantiate Ortega's account. However, General Counsel's Exhibit 10 clearly corroborates Ortega that he had been treated for some sort of medical problem in July 1979, 4 days before the start of his 6-week absence from work and that Respondent's insurance carrier paid a portion of the medical-care costs. In these circumstances, I credit the testimony of Ortega and Velasco over Donald Nourse that Respondent's employees commenced earning 2 weeks' paid vacation during the second year of employment and are entitled to receive this benefit on their second anniversary date. Therefore, I find merit in their claims that each had accrued and accordingly was entitled to receive earned vacation benefits prior to the start of the strike.[19] I further find that Respondent's asserted defense in this regard is without merit as a sham.

Based on the foregoing, as the record fully warrants the conclusion that Respondent harbored unlawful animus based on the employees' participation in the strike and as Respondent offered no credible business justification for its conduct, I further conclude that Respondent violated Section 8(a)(1) and (3) of the Act by failling and refusing to pay retirement benefits to Clifford Belvill and accrued vacation benefits to Ramon Ortega and Joseph Velasco. *Stokely-Can Camp*, 259 NLRB 961 (1981); *General Time Corp.*, 249 NLRB 1204 fn. 2 (1980); *Wallace Metal Products*, 244 NLRB 41 (1979).[20]

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By failing and refusing to pay retirement benefits to Clifford Belvill and accrued vacation payments to Ramon Ortega and Joseph Velasco because each participated in a strike against it, Respondent engaged in conduct violative of Section 8(a)(1) and (3) of the Act.

Remedy

Having found that Respondent violated Section 8(a)(1) and (3) of the Act in the foregoing manner, I shall recommend that it be ordered to cease and desist therefrom

[19] In agreement with Ortega, I believe that as of the date of his final demand for payment of vacation pay, May 1982, Respondent owed him 2 weeks' paid vacation which was earned during the time period February 27, 1980, through February 26, 1981. Inasmuch as employees apparently were permitted to take vacations when they desired and as the date of his demand was within 6 months of the filing of the charge in Case 21-CB-21628, I see no 10(b) problems. Also, in agreement with Velasco, I believe that as of the date of his final demand for payment of vacation pay, September 1982, Respondent owed him 1 week of paid vacation, earned during the time period September 21, 1980, through September 20, 1981. I see no 10(b) difficulties with the filing of the charge by Velasco.

[20] In light of the existence of unlawful animus herein, I find it unnecessary to decide whether or not Respondent would have violated the Act absent proof of antiunion motivation. *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967).

and to take certain affirmative measures designed to effectuate the policies of the Act. Having found that Respondent unlawfully refused to pay a retirement benefit, based on an established formula, to Clifford Belvill and accrued vacation benefits totaling a week's wages to Joseph Velasco and 2 weeks' wages to Joseph Velasco, I shall recommend that Respondent be ordered to pay said benefits to each with interest to be computed in the manner set forth in *Isis Plumbing Co.*, 138 NLRB 716 (1962) and *Florida Steel Corp.*, 231 NLRB 651 (1977). Also, I shall recommend that Respondent be ordered to post a notice, setting forth its obligations herein.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[21]

ORDER

The Respondent, Enterprise Aggregates Corporation, Arcadia, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to pay retirement benefits to employees because they engaged in a strike against it.

(b) Failing and refusing to pay accrued vacation benefits to employees because they engaged in a strike against it.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which will effectuate the policies of the Act.

(a) Pay to Clifford Belvill his retirement benefit, based on the established formula, in the manner set forth in the Remedy section herein, with interest.

(b) Pay accrued vacation benefits to employees Ramon Ortega and Joseph Velasco in the manner set forth in the Remedy section herein, with interest.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its plant located in Arcadia, California, copies of the attached notice marked "Appendix."[22] Copies of said notice,[23] on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

---

[21] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[22] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[23] Copies of said notice should be in Spanish and English.